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TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

No.

DAVIDSON TRANSFER & STORAGE COMPANY, INC.,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Davidson Transfer & Storage Company, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on April 24, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A hereto, infra, p. 1a. The United States District Court for the District of Columbia, in which court this cause originated, wrote no opinion. Its final order appears at page 9 of the Record filed with this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on April 24, 1958. No petitions for rehearing were filed.

QUESTIONS PRESENTED

1. Does a shipper of property, or a passenger moving, from one State to another by common carrier by motor have a legal right to recover back, by self-help or otherwise, any part of transportation charges paid on the basis of published rates filed with the Interstate Commerce Commission, effective at the time the transportation service was rendered and applicable to it, on the ground that the rates were unreasonable?

2. The Transportation Act of 1940 authorizes the General Accounting Office, upon audit after payment of bills for transportation rendered to the United States by common carriers subject to the Interstate Commerce Act or the Civil Aeronautics Act to deduct the amount of any overpayment to any such carrier from amounts subsequently due such carrier. Does this authority permit the General Accounting Office to make deductions on the ground that in its opinion published rates filed with the Interstate Commerce

Commission, effective at the time the transportation service was rendered, and applicable to it were unreasonable?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Transportation Act of 1940 are set forth in Appendix B hereto, infra, p. 9a.

STATEMENT OF THE CASE

Davidson is a common carrier by motor certificated to operate in interstate commerce by the Interstate Commerce Commission. At various times prior to July 20, 1953, it rendered transportation service to the United States, moving property of the United States in interstate commerce to, from, or through points in the State of New York. Davidson presented bills for its freight charges to the United States and they were paid. The charges were properly computed at the applicable and effective rates filed with the Interstate Commerce Commission in compliance with Section 217(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 317(a). Included as part of these filed, applicable and effective rates was what was known as the New York State Surcharge. This was a charge over and above the base rates on all movements to, from, through or between points in the State of New York. Its purpose was to recoup the cost to common carriers by motor of a ton-mile truck tax levied by the State of New York for the privilege of operating motor vehicles on the highways of the State, whether in intrastate or interstate commerce.

On July 20, 1953, after Davidson had rendered the United States the transportation service in question,

the Interstate Commerce Commission, exercising its authority under Section 216(g) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 316(g), found the Surcharge to be unjust and unreasonable and issued an order requiring Davidson and others to cancel it on or before September 4, 1953. The opinion is reported in 62 M.C.C. 117. The Order is reproduced herein as Appendix C, infra, p. 14a. Subsequently, on August 21, 1953, the Commission issued a second order postponing the date for cancellation of the Surcharge to October 15, 1953, on which date it was cancelled. This Order is reproduced herein as Appendix D, infra, p. 15a.

Thereafter the General Accounting Office of the United States, on post audit of Davidson's freight bills for the transportation service rendered the United States while the New York State Surcharge was in effect, demanded that Davidson refund to the United States the portion of its freight charges that were based on the surcharge. Davidson made refund under protest and, on February 15, 1955, brought suit for breach of contract to recover back in the United States District Court for the District of Columbia under the Tucker Act, 28 U.S.C.A. Sec. 1346 (a) (2). There being no issue of fact joined by the complaint and answer, cross motions for summary judgment were made and, on June 10, 1957, the District Court entered an order granting Davidson's motion for summary judgment and denying the cross motion of the United States.

On August 7, 1957 the United States filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. The case was briefed and argued to Associate Judges Prettyman,

Bazelon and Bastian. Judge Bazelon thereafter disqualified himself under Section 455 of the Judicial Code, 28 U.S.C.A. Sec. 455. On April 24, 1958 the Court issued its opinion by Judge Prettyman, Judge Bastian concurring, and entered judgment reversing the order of the District Court and remanding the cause to it "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective."

REASONS WHY THE WRIT SHOULD BE GRANTED

Preliminary Statement

This is a case of first impression in this Court. The first question presented goes to the very warp and woof of the regulatory scheme of Part II of the Interstate Commerce Act, also known as the Motor Carrier Act, 49 U.S.C.A., Sections 301-327. It has been squarely considered in only one other United States Court of Appeals, viz., the Court of Appeals for the Fifth Circuit in *T.I.M.E., Inc.* v. *United States*, 252 F. 2d 178, petition for certiorari filed May 26, 1958, No. 1027, October 1957 Term.[1] The second question has never been squarely considered in any Court.

The proper resolution of the first question is of vital significance to the entire motor carrier industry, to the United States in its capacity as a shipper, to the shipping public generally, and to the Interstate

[1] The Interstate Commerce Commission has consistently since its decision in *Bell Potato Chip Company* v. *Aberdeen Truck Line*, 43 M.C.C. 337 (1944), answered the first question presented yes. However, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 fn. 5, this Court held erroneous in 1954 an interpretation of the Natural Gas Act that the Federal Power Commission had followed since 1938, saying that "consistent error is still error."

Commerce Commission in the administration of the Motor Carrier Act. The proper resolution of the second question is of vital significance to the General Accounting Office in the discharge of its duties under Section 322 of the Transportation Act of 1940, 49 U.S.C.A. § 66, as well as necessary in order to stabilize the relationship between the United States as a user of transportation service and all types of common carriers—motor, rail, water and air.

The importance of the resolution of the two questions presented by this Court in this case is illustrated by the fact that counsel for Petitioner here is counsel for a large group of motor carriers in 9 separate cases now pending in various United States District Courts and in the Court of Claims. The questions presented here are in issue in all of those cases. As a practical matter, the resolution of them by this Court in this case may well be dispositive of, and will certainly shorten and simplify the litigation of those cases.

A Shipper Has No Right Against Motor Carriers to Reparations for Alleged Unreasonable Rates

The Montana-Dakota Case

The key to the solution of the problem in the first question presented is the proper interpretation and the applicability here of the opinion and holding of this Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). That was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern in interstate commerce, grounded on its payment of rates that had been filed with the Federal Power Commission under Section 205(c) of the Federal Power Act. The

gravamen of the complaint was an alleged violation of the requirement of Section 205(a) of that Act that rates be just and reasonable. The complaint alleged that Montana's rates were unreasonably high, that Montana had misled the Commission into accepting the rates by failing to comply with its obligations of disclosure under the Act, that the rates had therefore been improperly established, and that, through interlocking directorates, Montana had fraudulently prevented Northwestern from seeking redress from the Commission while the rates were in effect.

This Court held that the complaint failed to state a cause of action and ordered it dismissed. It held that rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." One "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at p. 251. In answer to Montana's argument that the District Court could retain the case on its docket and refer to the Federal Power Commission the issue of the reasonableness of the rates, the Court said:

> "But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent. 341 U.S. at p. 254.

The four dissenting Justices, speaking through Mr. Justice Frankfurter, agreed, in his words, that:

> "Despite the unqualified statutory declaration that unreasonable rates are unlawful, we think it clear that Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly* filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed." 341 U.S. at p. 258; emphasis supplied.

Their dissent was bottomed on the allegation in the complaint that the rates complained of were *not properly filed* with the Commission, i.e., were fraudulently filed. Since there is no claim in this case that any of Davidson's rates were improperly filed, the dissenting opinion is irrelevant on the issue here and the majority opinion must be treated as though it were unanimous.

The Montana-Dakota Case Is Not Distinguishable

Does the *Montana-Dakota* Case control here or is there any basis upon which it can be distinguished? Certainly there is no difference between the provisions of the Federal Power Act and the provisions of Part II of the Interstate Commerce Act from which a distinction can be drawn. Part II of the Interstate Commerce Act was enacted on August 9, 1935, 49 Stat. 543, just 17 days before the Federal Power Act was enacted on August 26, 1935, 49 Stat. 838. Both Acts confer rate regulatory authority on federal commis-

sions by substantively identical provisions couched in substantially the same language. In both Acts the authority to prescribe rates is limited to the fixing of rates prospectively. Section 216(e) of the Interstate Commerce Act provides only for the fixing of rates "thereafter to be observed" and for the fixing of practices "therafter to be made effective." Section 206(a) of the Federal Power Act provides for the fixing of rates and practices "to be thereafter observed and in force." Both Section 216(g) of the Interstate Commerce Act and Section 205(e) of the Federal Power Act provide that after hearings concerning the lawfulness of rate changes, the Commission may make such order as would be proper in a proceeding respecting existing rates, i.e., an order fixing the rates "thereafter to be observed."

Certainly no distinction between the *Montana* Case and this case can be based on the fact that there the claim of unreasonableness was pleaded by the purchaser of the service in a complaint as giving a substantive right to affirmative relief by way of reparations, while in this case it was pleaded in an answer as a defense to a suit by the seller of the service for its charges. If there is no substantive legal right to any rate other than the filed rate, a suit by a purchaser to recover charges paid on the ground that the filed rate was unreasonable will fail. Conversely, a suit by a seller to recover charges which have not been paid, to which the only defense is an allegation that the filed rate was unreasonable, will succeed. Any other conclusion would make the existence of the substantive rights and obligations of the parties depend upon which one was plaintiff and

which one was defendant. Such a conclusion would be absurd.[2]

The Erroneous Distinction Drawn by the Court Below

The Court of Appeals attempted to distinguish the *Montana* Case from the case at bar as follows, infra, p. 9a:

> "The difficulty [in Montana] was not lack of a cause of action but lack of a cause cognizable in a federal court . . ."

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[2] There are cases, not to be confused with this one, where a substantive right can be pleaded defensively even though procedurally barred from vindication by way of affirmative relief. See *United States* v. *Western Pac. Ry.*, 352 U.S. 59. In that case the United States pleaded as a defense to a suit by rail carriers for their charges that the rates were inapplicable and unreasonable. Part I of the Interstate Commerce Act concededly grants a substantive legal right to a reasonable rate *even though different than the filed rate.* Nevertheless, the Court of Claims overruled the defense on the ground that the two year statute of limitations on suits involving rates in Section 16(3) of the Act had run, and that therefore both the Interstate Commerce Commission and the courts were barred from granting the United States affirmative relief, i.e., reparations. This Court assumed without deciding that affirmative relief would be barred by limitations. However, it held that Section 16(3) did not bar the United States from pleading defenses that were *legally sufficient as a matter of substantive law* to a suit by carriers to recover charges. It further held that it did not bar the referral to the Commission of issues raised in those defenses which the Interstate Commerce Act *gave the Commission jurisdiction to resolve* and which were within its special competence. This holding that a statute of limitations bars affirmative relief in vindication of concededly existing substantive legal rights, but does not bar defenses based on those same substantive legal rights, cannot support a holding that whether or not there is a substantive legal right depends on whether the one claiming it is plaintiff or defendant.

On the other hand, said the Court of Appeals, infra, p. 9a:

> "In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling."

In other words the Court of Appeals read *Montana* as denying the existence of a justiciable legal right to a reasonable rate under the Federal Power Act, but at the same time leaving intact whatever common law right existed before its enactment. This reading is in direct conflict with the reading by the Supreme Court of Mississippi in *United Gas Pipe Line Company* v. *Willmut Gas & Oil Co.*, 97 So. 2d 530, pet. for cert. pending, No. 1021, Oct. Term, 1957, sub nom. *Willmut Gas & Oil Co.* v. *United Pipe Line Company*. On the same theory the Court denied the existence of a justiciable legal right to a reasonable rate under the Motor Carrier Act, but held that the common law right that existed before its enactment remained intact, and that in this case the right was enforceable in a federal court by virtue of the Tucker Act.

We submit that this is clearly an erroneous reading of the *Montana* holding. It treats the holding as purely procedural, i.e., as merely delimiting the types of causes of action that a federal court can entertain on their merits. The *Montana* Case of course did this. It held that a complaint alleging that a fraudulently filed rate was unreasonable did not state a cause of action that a federal court could entertain on its merits. But this holding was grounded squarely on the fact that a purchaser of electricity in interstate

commerce has no legal right justiciable in any court to any rate other than the rate filed with the Federal Power Commission, whether the filing was fraudulent or not. It follows that the suit would have been dismissed even had their been diversity of citizenship. It also follows that it would have been dismissed had it been brought as a common law action for fraud in a state court.

The foregoing is easily demonstrated. As this Court said in *Montana,* 341 U.S. at p. 252: "Before the [Federal Power] Act [Montana] would have had no statutory right to a reasonable rate, but it did have a common law right not to be defrauded into paying an unreasonable one." 341 U.S. at p. 252. However, it went on, the acts charged by Montana "do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remedial fraud." 341 U.S. at p. 253. But, said this Court, the Federal Power Act gave the Federal Power Commission the exclusive power to fix reasonable rates. At the same time it deliberately withheld from it the power to award reparations or to determine rates retrospectively. The necessary consequence was the abrogation of Montana's common law action. The suggested alternative, reference of the issue of reasonableness to the Commission, was rejected on the ground that it would subvert the statutory scheme by permitting Montana "indirectly to obtain Commission action which Congress did not allow to be taken directly." 341 U.S. at p. 254.

The dissenting Justices did not quarrel with this holding as applied to "properly" filed rates. They agreed that as to such rates there could be no recovery in damages on the ground that they were unreason-

able, under either the Federal Power Act or the common law. "The statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." 341 U.S. at p. 263.

The Court's Erroneous Theory of the Nature of the Shipper's Right

As we have seen, and as the Court of Appeals here held, Part II of the Interstate Commerce Act, like the Federal Power Act, but in sharp contrast to Part I of the Interstate Commerce Act, confines the rate regulatory authority of the Interstate Commerce Commission to the fixing of rates prospectively. The theory of the Court below was that since Part II of the Interstate Commerce Act did not in terms extinguish the common law right to reasonable rates for past services, "the right itself survived" and the common law remedy survived. Infra, p. 7a. This cannot be so.

The common law right to damages for the charging of unreasonable rates in the past was a right to the difference between the reasonable rate and the unreasonable rate. Concededly, under the doctrine of *Texas & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 427, 27 S. Ct. 350, no court can determine what this difference is. And as the Court below itself said, Part II of the Interstate Commerce Act failed to give the Interstate Commerce Commission authority to do so, that is, it "failed to provide an administrative forum for adjudication of the damages." Infra, p. 7a. Instead, it limited the Commission to the fixing of rates prospectively. It follows that both the common law right and the common law remedy were abrogated, and

that the only judicially cognizable right remaining is that given by the Act, namely, as *Montana* put it, the right to "the filed rate, whether fixed or merely accepted by the Commission."

The Court of Appeals relied on the fact that Section 216(j) of Part II of the Interstate Commerce Act provides that common law remedies "not inconsistent" with the rate regulatory provisions of Section 216 survive its passage. The answer to this is found in the *Abilene* Case, *supra,* 27 S. Ct. at p. 356. That was a common law suit in a state court by a shipper against a rail carrier alleging that an excessive and therefore unreasonable rate had been charged. The shipper argued that the suit was maintainable because Section 22 of the Interstate Commerce Act provides, *inter alia,* that: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies" The breadth of this savings clause is in sharp contract with the narrowness of the savings clause in Section 216(j). Nevertheless the Supreme Court held that the suit would not lie, saying:

> ". . . we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of." 27 S. Ct. at p. 356.

Dealing specifically with the savings clause, this Court said:

> "This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." 27 S. Ct. at p. 358.

The *Abilene* holding was specifically affirmed, if not enlarged, as recently as 1949. In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 437, the Supreme Court rejected the Commission's argument that a shipper by rail could vindicate his right to reparations specifically granted by Part I of the Act in a federal district court. It did so notwithstanding that Section 9 gives a shipper alternative remedies, either complaint to the Commission or suit in a federal court. The Court held that "it has been established doctrine since this Court's holding in [the *Abilene* Case] that a shipper *cannot file* a Sec. 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for the exercise of the Commission's primary jurisdiction." Emphasis supplied. Since a cause of action to enforce a right to reparations specifically granted by Part I will not lie, *a fortiori* a common law cause of action to enforce a right to reparations deliberately withheld by Part II will not lie.

A Common Law Right and Remedy Are Unconstitutional

There is another conclusive reason why there can be no common law right or remedy against motor carriers for alleged unreasonable past rates on interstate movements. Common law rights exist only by the

force of state law. There is no federal common law. Moreover, the federal courts are bound by the state courts in the construction and application of the common law of a state. *Erie R. R.* v. *Tompkins,* 304 U.S. 64. No state has constitutional power to regulate the rates charged by common carriers for transportation from one state to another. *Wabash Ry.* v. *Illinois,* 118 U.S. 557. It follows that a cause of action for damages for unreasonable rates charged for such transportation would not lie under the common law of any state. A state no more has constitutional power to regulate rates retrospectively through its judiciary than it has to regulate them prospectively through its legislature.

It is no answer to say that the regulation of the rates would as a practical matter be the same as that which the Interstate Commerce Commission would impose had it authority to do so, because its determination of reasonableness would be sought and accepted by the Court. The facts would remain that (1) the right that would be vindicated and the remedy that would be granted would be an exercise of unconstitutional power by the state whose common law was invoked, and (2) the court in which suit was brought would enter a judgment based upon a quasi-judicial determination by the Commission that it has no authority to make under the power delegated to it by the Congress. Cf. *Montana-Dakota, supra,* and *Hope Natural Gas Co.* v. *F.P.C.,* 134 F. 2d 287, 310 (C.A. 4th 1943), holding that the Federal Power Commission, having only quasi-legislative power, has no power to award reparations under the Natural Gas Act and therefore "certainly no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions."

The Conflict and Confusion in the Law

If ever there was a vital and constantly recurring question of national scope on which the law is conflicting and confused it is the first question presented by this Petition. The Federal Power Commission and at least one state supreme court interpret the *Montana* Case as barring absolutely both the Commission and the courts from either determining past reasonableness or awarding reparations. See *United Gas Pipe Line Co.* v. *Willmut Gas and Oil Co.*, 97 So. 2d 530 (Miss. 1957) petition for certiorari pending, No. 1021, October Term, 1957, sub nom. *Willmut Gas and Oil Co.* v. *United Gas Pipe Line Co.* The Interstate Commerce Commission interprets the *Montana* Case as barring it from awarding reparations against motor carriers, but not as barring determinations of past reasonableness. See *U. S.* v. *Davidson Transfer & Storage Co., et al.*, 302 I.C.C. 87 (1957).[3]

The Court of Appeals here held that there was a common law right to reparations against a motor carrier. The Commission in the *Bell Potato Chip* Case, *supra,* at p. 342, held that the Interstate Commerce Act "superseded the common law right." The District Court for the Western District of Virginia, faced with a motion to dismiss a suit for reparations by a private shipper for lack of diversity of citizenship on the authority of the reading of the *Montana* Case by the Court of Appeals here, held that a shipper had both "a theoretical action at common law" and an action under an Act of Congress regulating com-

[3] The cited *Davidson* Case is not part of or factually or procedurally related to the instant case, although between the same parties.

merce. *Lynchburg Traffic Bureau* v. *Smith's Transfer Co.*, C.A. 414, Lynchburg Division.

This Court in *U. S.* v. *Interstate Commerce Commission, supra,* held that a suit for reparations could not be initiated until after the Commission had determined the past reasonableness of the rate. The Commission dismisses complaints to it seeking the determination of past reasonableness unless a suit for reparations is pending when the complaint is filed, *Sinclair Pipe Line Co.* v. *Transamerican Freight Lines*, No. MC-C-2035, decided April 28, 1958. If the complaint assails both present and past reasonableness the Commission determines the former but, absent the pendency of a suit in court, refuses to determine the latter. *Schlonsker, Trustee* v. *Ellis Trucking Co., et al.*, No. MC-C-1786, decided January 20, 1958. In one and the same breath, in a case in which the only issue is the reasonableness of past rates, the Commission says that its function is to *determine* the issue of reasonableness, but that "it is not our province to pass on the ultimate questions of whether complainants or defendants would prevail" in court. *U. S.* v. *Davidson Transfer & Storage Co., et al., supra.*

We submit that the first question presented in this Petition should be laid to rest and the correct law on it spelled out by the Supreme Court of the United States.

The General Accounting Office Has No Authority to Deduct From Amounts Due Carriers on the Ground That in Its Opinion Filed and Applicable Rates Are Unreasonable

Basis for Considering the Question

If a shipper has no legal right against a common carrier by motor to any rate other than the filed rate, obviously the General Accounting Office has no authority to deduct charges paid on the basis of a filed and applicable rate from amounts otherwise due common carriers on the ground that the filed rate was unreasonable. In other words, if the first question presented in this Petition be answered no, the second question will be moot. Therefore, we assume *arguendo* in the discussion that follows that the first question is answered yes. The fact that this second question was not considered by the Court of Appeals neither forecloses nor militates against its consideration here. It is a naked question of statutory interpretation which does not turn on the facts of any particular case. It was not considered by the Court of Appeals because, although Davidson argued it in support of its motion for summary judgment, the District Court did not consider it and therefore neither party raised it in brief or argument.

The Action of the Court Was Error Under the Interstate Commerce Act

The Court of Appeals held that it was not clear from the findings of the Interstate Commerce Commission in *Surcharges—New York State,* 62 M.C.C. 117, whether it "meant to find the surcharge an unreasonable rate during the then-past period when it was in effect." Infra, p. 8a. Consequently, although it reversed the judgment for Davidson for its charges, it did not enter judgment for the United States. Rather,

it remanded the cause to the District Court "with instructions to refer to the Interstate Commerce Commission the question of the reasonableness of the filed tariff surcharge as a rate during the period when it was filed and effective. Upon receipt of that finding the District Court will proceed to the adjudication of the action before it." Infra, p. 9a.

We submit that this action was erroneous. Until the Interstate Commerce Commission finds a rate unreasonable and prescribes another in lieu thereof, a carrier rendering transportation service to which the rate is applicable is entitled, indeed is bound in law, to collect and retain charges based on it. The General Accounting Office therefore unlawfully deducted the surcharge from amounts otherwise due Davidson and Davidson is entitled to the judgment the District Court gave it.[4]

The whole statutory scheme of rate regulation of common carriers under both Part I and Part II of the Interstate Commerce Act makes a distinction between overcharges and charges based upon allegedly unreasonable rates. Thus, Section 217(a) of the Interstate Commerce Act requires the filing of tariffs. Section 217(b) forbids carriers to "charge or demand or collect or receive a greater or less or different compensation" than that specified in the filed tariffs. Section

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[4] There were actually no deductions in this case. Following its custom, the General Accounting Office made demand on Davidson for refund of the alleged overpayments, stating that if it were not made within 60 days deductions against other bills would be made. Because deductions complicate its accounting procedures Davidson, as do many carriers, made refund under protest. This has been uniformly treated by the General Accounting Office, the carriers and the courts as the equivalent in law of deduction.

222(c) subjects to criminal penalties "Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof" who shall "assist, suffer or permit any person . . . natural or artificial, to obtain transportation of . . . property for less than the applicable rate . . .".

The Interstate Commerce Commission has exclusive authority to determine that applicable rates are in fact unreasonable, and shippers are bound to pay applicable rates, whether or not they think them unreasonable, until the Commission, acting after notice and hearing under the Act, (Section 15(1) rail or Section 216(e) motor) finds that such rates are unreasonable and prescribes reasonable rates in lieu of them. *T. & P. Ry.* v. *Abilene Cotton Oil Company,* 204 U.S. 426 (1907); *Arizona Grocery Company* v. *Atchison, T. & S. F. Ry.,* 284 U.S. 370 (1932); *Loveless Mfg. Co.* v. *Roadway Express,* 104 F. Supp. 809 (D.C. Okla. 1952); *Pyramid Nat. Van Lines* v. *Goetze,* 65 A. 2d 595 (Mun. App. D.C. 1949).

On the other hand, overcharges as defined in the Interstate Commerce Act may be recovered without resort to the Commission. They may be recovered in Court without reference to the Commission. See *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285; *U. S.* v. *Western Pac. R. Co., supra,* 352 U.S. at p. 69. They may be voluntarily refunded by the carrier. As early as 1910 the Commission held that there "should be no necessity for appealing to governmental authority to award damages for plain overcharges. It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in law against both the carrier and its

agent." *National Refrigerator and Butcher Supply Co.* v. *Illinois Central R.R. Co.*, 20 I.C.C. 64, 65.

In short, a common carrier, in accord with his obligations under the Interstate Commerce Act to abide his tariffs, is under a duty to refund overcharges upon demand. But, by the same token, he is under a duty to collect and a shipper under a duty to pay charges based on legal, applicable rates, whether or not those tariffs are, or are thought to be, unreasonable, and even though rates other than applicable rates have been charged over a long period of time. *Aetna Plywood & Veneer Co.* v. *Indianapolis Forwarding Co.*, 52 M.C.C. 591, 594 (1952). To do otherwise is to violate the Interstate Commerce Act. On more than one occasion a carrier has been "admonished that its duty as a common carrier under the Interstate Commerce Act is to make certain that the applicable fares are collected." *Alexandria, Barcroft & Washington Fares Between the District of Columbia & Virginia*, 48 M.C.C. 613, 626 (1948).

The Transportation Act of 1940 Gives No Authority to Deduct for Unreasonableness

The body of fundamental law just set forth is applicable whether the transportation service is rendered to the United States or to a private person. Section 321 of the Transportation Act of 1940 requires the United States to pay "the full applicable commercial rates" for the transportation service rendered it by a common carrier subject to the Interstate Commerce Act unless special contracts are entered into pursuant to Section 22 of that Act, which was not done here. Section 322 requires the United States to pay for transportation

service by common carriers "upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office", but reserves the right in the United States "to deduct the amount of any *overpayment* to any such carrier from any amount subsequently found to be due such carrier." Emphasis supplied.

This Court, in *U. S.* v. *N. Y., N. H. & Hartford R. R.*, 78 S. Ct. adv. 212, considered in detail the history of Section 322 of the Transportation Act of 1940. Prior to its adoption the United States "protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct." 78 S. Ct. at p. 214.

> "[T]he Congress was desirous of aiding the [carriers] to secure prompt payment of their charges, but it is also clear that the Congress, and the [carriers], contemplated that the Government's protection against *overcharges* available under the preaudit practice should not be diminished. The burden of the carriers to establish the correctness of their charges was to continue unabridged. The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund *overcharges* when such charges were administratively determined. The carrier would then have 'to re-collect' the sum refunded by justifying its bills to the agency or by proving its claim in the courts." 78 S. Ct. at p. 216. Emphasis supplied.

To assure compliance by carriers with their obligation to refund overcharges "administratively determined," Section 322 conferred on the "United States Government" authority "to deduct the amount of any

overpayment" from other amounts due them. Obviously the key to the reach of this authority is the meaning of the word "overpayment". We submit that what is an overpayment by a shipper is necessarily an overcharge by a carrier. The two are correlative terms. Therefore, that which is not an overcharge is not an overpayment. Section 204a(5) of the Interstate Commerce Act specifically defines overcharges by a motor carrier "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." This is the identical definition of overcharges by a rail carrier made in Section 16(3)(g) of the Act. An overcharge and its correlative, an overpayment, are thus legislatively defined to exclude charges or payments properly and accurately computed on applicable rates.

In the light of the foregoing, we submit that Section 322 of the Transportation Act of 1940 does not authorize deduction on the ground that the General Accounting Office thinks applicable rates unreasonable. That this Court so interprets Section 322 is implicit in the opinion in the *New Haven* case. The Court uses the terms "overcharge" and "overpayment" interchangeably. It refers to the duty of carriers "promptly to refund overcharges" that have been "administratively determined", referring to the determinations made by "the responsible government officers" or the General Accounting Office. Again, it speaks of the carriers' burden of proving the "correctness of their charges", either to "the agency" or "in the courts".

All of this is absolutely inconsistent with a right in the Government to recoup charges properly and accurately computed on applicable rates unless the Inter-

state Commerce Commission has first (1) found those rates unreasonable and (2) prescribed reasonable rates in lieu of them. As was said in *Montana-Dakota*, 341 U.S. at p. 251:

> "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high . . . To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

Thus, neither the "responsible government officers" nor the General Accounting Office can "administratively determine" rate reasonableness. Nor can the courts determine it. Therefore, the reasonableness of the carriers' rates cannot be part of their burden of proving "the correctness of their charges".

The United States does not claim here that Davidson's charges were not correct, i.e., not properly and accurately computed on filed and applicable rates. In these circumstances the General Accounting Office had no authority to deduct them from other amounts due Davidson. That Office having unlawfully deducted them, Davidson had a right "to re-collect" them in court. This was the right the judgment of the District Court vindicated. The Court of Appeals, in reversing that judgment, in effect interprets Section 322 as repealing the Interstate Commerce Act *pro tanto* by giving the General Accounting Office the prerogative of "administratively determining" rate reasonableness. This is a prerogative that not even the Interstate Commerce Commission has. It can determine rate reason-

ableness only in accord with the specific procedures prescribed by the Congress in the Interstate Commerce Act and the Administrative Procedure Act to assure a full and fair hearing and findings supported by substantial evidence.

Finally, the effect of reversing Davidson's judgment for its charges is to vitiate Section 321 of the Transportation Act of 1940, i.e., to relieve the United States of its obligation under that Section to pay "'the full applicable commercial rates, fares, or charges'' for transportation service rendered it by common carriers subject to the Interstate Commerce Act. Under the holding of the Court of Appeals the General Accounting Office can "administratively determine" that applicable rates are unreasonable and force refund of charges based on them. The carrier must then either bring suit or give up. If he brings suit he must not only prosecute his claim in court but in a proceeding before the Interstate Commerce Commission, where, under the rule of the *New Haven* Case, he presumably has the burden of proving that rates filed with and accepted by the Interstate Commerce Commission are reasonable—a burden that is not his under the Interstate Commerce Act. Faced with this prospect, and since deductions based on charges by any particular carrier computed on any particular rate are ordinarily small, e.g., $18.34 in this case, the carrier usually has to give up. The practical result is that, as far as transportation for the United States is concerned, the General Accounting Office has assumed the rate regulatory function of the Interstate Commerce Commission.

CONCLUSION

For the reasons set forth in this Petition, Davidson Transfer & Storage Co., Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit and that upon review of the Record in that Court its judgment be reversed and the cause remanded to it with directions to re-instate the judgment of the United States District Court for the District of Columbia.

Respectfully submitted,

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